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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

MARY LOIS McINTOSH, Petitioner,

vs.

ELLA L. WIGGINS, Respondent.

No. 915.

PETITIONER'S REPLY BRIEF.

PAUL BAKEWELL, JR.,
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A Fraud Upon the Supreme Court of Missouri Established by the Decision of That Court.

The fraud in obtaining the decree containing the paragraph was upon *the Supreme Court of Missouri itself* and in the very act of procuring the judgment.

The decision of that Court cites and quotes the "erroneous representations" made by counsel. Those "erroneous representations" were not made to any party, *but were made to the Court itself.*

That Court decided that such "erroneous representations" constituted a fraud, necessarily upon the Court itself. It also decided that the paragraph of the decree obtained thereby was a fraud "upon the *rights*" of the other remainderman.

The majority opinion below is in direct conflict with that decision by the Supreme Court of Missouri as to fraud.

"Where fraud in obtaining a judgment is established the estoppel of the judgment vanishes" (*Wagoner vs. Wagoner*, 287 Mo. 567, citing numerous decisions).

Where fraud has caused a judgment, it is immaterial whether it be actual or constructive fraud. Either vitiates the judgment and deprives it of any effect as an estoppel. *Mangold vs. Bacon*, 229 Mo., p. 487; *Clyce vs. Anderson*, 49 Mo. 37. See also *Johnson vs. Waters*, 111 U. S., p. 667; *Arrowsmith vs. Gleason*, 129 U. S., p. 100.

"Constructive fraud is simply a term applied to a great variety of transactions * * * which equity regards as wrong, to which *it attributes the same or similar effects*, as those which follow from *actual fraud*, and for which it grants *the same or similar relief* as that granted in case of real fraud. It covers different grades of fraud" (*Pomeroy*, 5th Ed., Sec. 922, Vol. 3, p. 626).

The Rights of This Petitioner Are Identical With the Rights of Mrs. Kennard.

Neither had any rights while the life tenants were alive. Upon the death of Mrs. Kilpatrick, Petitioner's mother, the rights of Petitioner and of Mrs. Kennard vested in them since they then became "the heirs of her body at the time of her death."

That was in 1928.

Erroneous Representations Were Made to the Supreme Court of Missouri by Counsel for Mrs. Wiggins, the Respondent, the Same Counsel Who Represents Her Here.

The Supreme Court of Missouri has said:

"* * * there were statements in the briefs, in effect, contrary to the construction in the challenged paragraph. * * *

* * * * * * *

"From Mr. Kirby's brief: 'In case a daughter should die during the trust period, then the remainder of the said subject-matter with which the testator was here dealing—the equitable estate during the rest of the trust—should go over to the heirs of the body of the deceased daughter, and in default of such heirs, then to the survivors of the daughters, again with remainders over to the heirs of their bodies'" (R., p. 248).

The Supreme Court of Missouri decided that such erroneous representations constituted a fraud and that the paragraph of the decree was a fraud upon the rights of the other remainderman (R., p. 370).

Such decision vitiated the paragraph of the decree and yet Respondent pleaded the said paragraph as an affirmative defense (R., p. 38) and the majority below sustained the paragraph as valid and binding and as res adjudicata, in direct conflict with the highest Court of Missouri. The majority below gave full effect to a State decree after the Supreme Court of that State had vitiated it by establishing fraud in its procurement.

The Distinction Between a Fraud Upon a Court and a Fraud Upon an Individual.

A fraud upon a *Court* vitiates the decree obtained thereby. Necessarily, the parties must then stand as if no such decree had ever existed.

A fraud upon a *party*, without any fraud upon a Court, may be a different matter.

But we are here dealing with a fraud upon the Courts of Missouri in obtaining a decree, as that fraud has been adjudged and established by the highest Court of Missouri.

If the Court below had followed the law of Missouri, or if it had given full faith and credit to the judgment of the

Supreme Court of Missouri, it would necessarily have accepted the judgment of that Court and, therefore, would have held that the decree had been vitiated by fraud upon the Court itself, which was a fraud upon the rights of this Petitioner and, therefore, that the decree was a nullity.

The further statements by the Court below were based upon its own decision that there had been no fraud.

But *subsequently* the Supreme Court of Missouri specifically found the facts and adjudged that the facts so found by it constituted a fraud.

Petitioner Here Was Not Negligent in the Will Construction Suit.

a) In that suit Mrs. Wiggins denied any claim to the Fowler portion. On the contrary, Mrs. Wiggins alleged that Mrs. Fowler owned that portion absolutely. The Court decided in 1923 that Mrs. Fowler had only an estate for her life and that the remainders over to arise on her death were contingent.

Neither Petitioner nor Respondent could have asserted any claim to the Fowler portion prior to the happening of the contingent events which would cause it to pass.

Petitioner had no right and could not acquire any right, interest, estate or title until the happening of the contingency specified; i. e., the death of her mother and Petitioner becoming an heir of her body. *That did not occur until 1928.*

This Court has decided:

> "Up to the moment of Henrietta Wright's [the life tenant's] death her children had *no* interest in the land except a bare *contingent* remainder *expectant* upon her death and their surviving her. *At her death it came to them* as an estate in fee in possession absolute" (*Wright vs. Blakeslee,* 101 U. S., p. 177).

Such is the law in Missouri. *Dickerson vs. Dickerson,* 211 Mo., p. 489; *Godman vs. Simmons,* 113 Mo., p. 131.

> "The *expectation* of a future event that *may* give an interest *is not* a thing which would justify a court of equity in entertaining a suit at the instance of a party *having that and nothing more*" (*Davis vs. Angel,* 4 DeG. & F. 524, 45 English Reprint 1287).
>
> "A remainder-man may have a decree to protect the estate from waste, and have it so secured by the trustee as to protect his estate in expectancy. The court will interfere under all needful circumstances to protect his rights, *but such cases do not come within the category of mere declaratory* decrees as to *future rights*" (*Cross vs. DeValle,* 1 Wallace, p. 15).

b) The absence of a defendant does not permit a fraud upon the Court, and where such a fraud has been established, the absence of a defendant is not negligence and may not be asserted by a party who committed such fraud.

c) Under the law of Missouri, a plea of negligence is not a valid defence to an action based upon fraud. *Overton vs. Overton,* 327 Mo. 530.

The Respondent Committed a Fraud Upon the Highest Court of Missouri and Caused a Legal Perversion.

Mrs. Wiggins was a plaintiff in the original will construction suit. The same counsel who represented her in that suit represents her in this suit.

Her bill in the will construction suit signed by that counsel stated the purpose of her suit was to give "full effect to the intent of the testator" (Phys. Ex., p. *202).

The Supreme Court of Missouri has established that her counsel, Mr. Kirby, stated in his brief to that Court that the testator intended that on the death of a daughter with-

out issue, her portion should go "then to the survivors of the daughters, again with remainders over to the heirs of their bodies" (R., p. 248).

The said Supreme Court has also established that he did not advise the Supreme Court that a paragraph of the decree was to the contrary (R., p. 369).

It also established that such erroneous representations were a fraud and were a fraud upon the rights of the other remainderman, whose rights were identical with those of Petitioner (R., p. 370).

The same counsel for Mrs. Wiggins in her answer here pleads as an affirmative defense (R., p. 338) the paragraph of the decree, which contradicts the intention of the testator, as stated by him to the Supreme Court.

The same counsel expressly avers that Mrs. Wiggins did not present that paragraph of the decree to the Supreme Court of Missouri because Mrs. Wiggins "did not desire to have the same reviewed or altered" (R., p. 333).

The result of such erroneous representations so made to the Supreme Court of Missouri by Respondent here was a legal perversion; to wit:

a) a suit to give full effect to the testator's intention;

b) an opinion of the Supreme Court, which stated that intention; and

c) a paragraph of the decree remaining on the record, which contradicted that intention.

With the express admission by the Respondent that she did not present said paragraph to the Supreme Court because she did not wish to have it reviewed, and with the majority opinion below giving to Respondent the full benefit of such paragraph, when pleaded by her as an

affirmative defense in a Court of Equity, we submit that this record constitutes a legal monstrosity.

We submit the case as being one without a precedent.

The Gravity of the Error of the Court Below Becomes Apparent by Considering the Accident of Possession.

If upon the death of her mother, Mary Lois McIntosh had acquired possession of this property, and if Mrs. Wiggins had sued upon said paragraph of said decree to obtain the property because of said decree, we submit that she could not have obtained the said property in any Court of Equity for one reason alone—the decree was unjust.

Here by a circumstance, upon the death of Mrs. Kilpatrick, Mrs. Wiggins, her sister, actually acquired possession of the property.

In a suit by her sister's child, Mrs. Wiggins pleads as an affirmative defense the unjust and fraudulent paragraph of the decree and the Court below sustains that defense, even after the Supreme Court of Missouri, which rendered the final judgment in the will construction suit, has established that such decree was obtained by a fraud upon that Court itself, and that it constituted a fraud upon the rights of the other remainderman.

Admitting that under the law of Missouri the property vested in Mary Lois McIntosh in 1928, the Court below, sitting in Equity, allows the Respondent to shield herself in the possession of that property by a decree, which the Supreme Court of Missouri said had been the result of fraud.

Respectfully Petitioner prays that this Court grant its writ of certiorari and that it consider and decide the questions presented by such petition, and particularly that in the interest of the "integrity of judicial action," this Court

determine whether a party may have any benefit in a Court of Equity from a decree, which perverts Justice and perverts the purpose of the suit in which it appears by defeating the intention of the testator.

Respectfully submitted,

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